Supreme Court, U. S.
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No. 77-865

In the Supreme Court of the United States

OCTOBER TERM, 1977

LARRY POWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the evidence at trial was insufficient to establish a conspiracy to distribute a controlled substance.

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of one count of conspiracy to distribute a controlled substance, in violation of 21 U.S.C. 846. He was sentenced to a term of seven years' imprisonment and three years' special parole. The court of appeals affirmed (Pet. App. 1-7).

1. The government's evidence, which is undisputed, is summarized in the opinion of the court of appeals (Pet. App. 2-4). Ike Conway, an unindicted co-conspirator,[1]

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[1]Conway negotiated a plea agreement prior to trial (Tr. 139).

testified that he had contacted petitioner in the spring of 1976 and informed him that his source for heroin in Los Angeles would sell the drug at $1,000 an ounce. Shortly thereafter, petitioner and Conway flew separately from Omaha to Los Angeles, where they checked into the Airport Inn and contacted Conway's source of supply, one Herman Douglas (Tr. 56). Petitioner and Conway purchased $10,000 worth of heroin from Douglas in the parking lot of the motel; petitioner then returned to Omaha and sold the drugs (Pet. App. 2). Conway returned several days later.

About a month later, petitioner and Conway flew together from Des Moines, Iowa, to Los Angeles. They again checked into the Airport Inn and arranged to purchase $20,000 worth of heroin from Douglas (Tr. 69-79). After the purchase, petitioner returned alone to Omaha and sold the drugs (Pet. App. 3).

In July of 1976, petitioner and Conway flew a third time to Los Angeles, this time from Lincoln, Nebraska (Tr. 81-82).[2] They checked into a different motel and contacted Douglas. Petitioner negotiated with Douglas for several days regarding purchase of half a "brick" of uncut heroin for $20,000, but Douglas refused to sell at that price (Tr. 83-84). Petitioner returned to Omaha alone and spoke to Conway a week later, informing him that he had obtained a better deal and had bought a full "brick" for $36,000 (Tr. 108).

2. Petitioner contends (Pet. 7-9) that the evidence was insufficient to establish a conspiracy to distribute the heroin because there was no direct proof that the seller

[2]Conway explained that they traveled to Los Angeles from cities other than Omaha because they were suspicious and did not want to be observed (Tr. 67).

(Douglas) had knowledge that the buyer (petitioner) intended to distribute the drugs. But it is well-established that proof of an explicit agreement is unnecessary to prove a conspiracy between the buyer and seller of drugs, where there is an abundance of circumstantial evidence involving multiple sales of a large quantity of the drugs. *Direct Sales Co.* v. *United States,* 319 U.S. 703. As the court of appeals correctly noted (Pet. App. 4), "[a] conspiracy is rarely susceptible of proof by direct evidence but must be proved by circumstantial evidence. *Valentine v. United States*, 293 F. 2d 708, 710 (8th Cir. 1961), *cert. denied,* 369 U.S. 830 (1962)." See *Diaz-Rosendo* v. *United States,* 357 F. 2d 124, 129 (C.A. 9) (*en banc),* certiorari denied, 385 U.S. 856.

The undisputed evidence, viewed in the light most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60, 80, sufficiently established the existence of a conspiracy between petitioner, Conway and Douglas. Petitioner and Conway traveled three times to California to purchase heroin from the supplier Douglas, and petitioner twice brought back heroin for sale. The careful arrangements show that each participant had an essential role to perform in order for petitioner to acquire, transport, and sell the drugs, and that these roles were carried out in each instance. Moreover, the jury could infer from Conway's testimony and from the vast quantity of drugs sold to petitioner in a short period of time[3] that Douglas must have known that the drugs would be distributed (see *United States* v. *Steinberg*, 525 F. 2d

[3]The court of appeals noted that the amount and value of the drugs is proper circumstantial evidence from which the jury may infer an intent to distribute as opposed to possession for personal use (Pet. App. 5). See *United States* v. *Blake,* 484 F. 2d 50, 58 (C.A. 8), certiorari denied, 417 U.S. 949.

1126, 1133 (C.A. 2)) and "knew of and participated in promoting the buyer's intended illegal distribution" (Pet. App. 4). Indeed, successful resale of a large quantity of drugs would seem to be the *sine qua non* of a continuing profitable relationship between the wholesale seller and purchaser. Further review of this essentially factual issue is therefore not warranted.[4]

3. Contrary to petitioner's contention (Pet. 7), the trial court did not err in refusing to instruct the jury that a conspiracy is "an agreement between two or more persons to accomplish together a criminal or unlawful act." The court correctly defined conspiracy in its charge (Pet. 5-6), which was identical to the standard conspiracy instruction See Devitt and Blackmar, *Federal Jury Practice and Instructions*, §27.04 (1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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[4]Petitioner's contention (Pet. 10-14) that this case conflicts with other cases from the Second, Fifth, Seventh and Ninth Circuits is groundless. In each of those cases, the evidence disclosed, at most, a simple buyer-seller relationship. There was no evidence of a continuing course of conduct by which the jury could reasonably infer that a conspiratorial agreement had been reached. *United States* v. *Spanos*, 462 F. 2d 1012 (C.A. 9); *United States* v. *Koch*, 113 F. 2d 982 (C.A. 2); *United States* v. *Ford*, 324 F. 2d 950 (C.A. 7). Here, there was an abundance of evidence that petitioner and Douglas were conspiring on several occasions within a short period of time to distribute a controlled substance illegally, and the court of appeals correctly concluded (Pet. App. 4) that "the record establishes much more than a simple buyer-seller transaction."

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